Editor's note: Appealed -- dismissed upon agreement of parties, Civ.No. C-87-254-K (D. Wyo. Mar. 23, 1988) -- dismisssal with prejudice as part of 10th Cir. settlement of Ark Land case No. 87-2790 (not an IBLA case)

ARK LAND CO.

IBLA 86-255, 86-1449 Decided May 13, 1987

Appeal from decisions of the Wyoming State Office, Bureau of Land Management, readjusting coal lease Cheyenne 033800, and increasing lease bond.

Decision in IBLA 86-255 affirmed as modified and remanded; decision in IBLA 86-1449 affirmed.

1. Coal Leases and Permits: Leases -- Coal Leases and Permits: Readjustment

   When BLM gives a notice of intent to readjust a coal lease to the lessee prior to the 20-year lease anniversary date, the notice satisfies the statutory requirement for timely readjustment and BLM may, within the time provided in 43 CFR 3451.1, subsequently provide the specific terms and conditions for readjustment.

2. Coal Leases and Permits: Leases -- Coal Leases and Permits: Readjustment

   The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to that Act. All terms and conditions of the lease are subject to readjustment.

3. Coal Leases and Permits: Leases -- Coal Leases and Permits: Readjustment

   BLM's decision to readjust a coal lease will be affirmed where the readjusted provisions challenged by the lessee are mandated by statute or regulation or where such provisions are in accordance with the proper administration of the public lands.

4. Coal Leases and Permits: Leases -- Coal Leases and Permits: Readjustment

   In accordance with 30 U.S.C. § 207(a) (1982), readjusted lease terms will provide that royalty for coal

mined will not be less than 12-1/2 percent of the value of coal removed from a surface mine. Pursuant to 43 CFR 3473.3-2(a)(3), royalty for coal removed by underground methods will be 8 percent unless the lessee establishes that conditions warrant a lower amount, but in no case shall the lease term provide for less than 5 percent royalty for coal removed by underground operations. In the absence of either on-going underground mining operations or a pending resource recovery and protection plan which contemplates underground operations, a lessee cannot establish that conditions warrant the imposition of less than an 8 percent royalty as a readjusted term.

5. Coal Leases and Permits: Leases -- Coal Leases and Permits: Readjustment

The decisions of the Board of Land Appeals are final for the Department upon issuance. Thus, absent affirmative action by a Federal Court, a decision of a State Office directing an increase in bonding levels based on increased rental and royalty rates under readjusted lease terms which have been approved by the Board will be affirmed, even though the decision readjusting the rental and royalty rates is the subject of a suit for judicial review.

APPEARANCES: Blair M. Gardner, Esq., St. Louis, Missouri, and Brian E. McGee, Esq., Denver Colorado, for appellant; Stephen M. Brown, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Ark Land Company (Ark Land) is the holder of Federal coal lease Cheyenne 033800 issued by the General Land Office under the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. § 181 (1982), effective October 8, 1924. By its terms, the lease was subject to readjustment on October 8, 1984. The lease had been previously subject to readjustment in October 1944 and 1964. Ark Land appeals from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated November 26, 1985, overruling in part lessee's objections to proposed readjusted terms and conditions for coal lease Cheyenne 033800. The appeal is docketed as IBLA 86-255. Subsequent to that decision, by decision dated May 27, 1986, the Wyoming State Office notified appellant that it was required to increase the bond in this lease from $ 22,000 to $ 454,000. Ark Land has appealed this decision as well. This latter appeal is docketed as IBLA 86-1449. By Order dated January 28, 1987, we informed appellant that the two appeals would be consolidated for purposes of decision. We will first examine the decision of November 26, 1985.

At the time of issuance of the original lease, section 7 of the MLA, 41 Stat. 439, provided:

> Leases shall be for indeterminate periods upon condition * * * that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods.

Section 7 of the MLA was amended by section 6 of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. § 207(a) (1982), to read in pertinent part: "Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended."

Section 3(d) of the original lease form specifically provides:

> The lessor expressly reserves * * *:
>
> * * * * * * *
>
> (d) Readjustment of terms. The right reasonably to readjust and fix royalties payable hereafter and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

[1] Ark Land asserts that the lease was not timely readjusted because BLM was still considering its objections to the proposed terms and conditions when the 20-year period ended on October 8, 1984. This Board has repeatedly addressed the central issues of the authority of BLM to readjust Federal coal leases and the applicability of FCLAA and its implementing regulations to pre-FCLAA leases. E.g., Coastal States Energy Co., 94 IBLA 352 (1986); Gulf Oil Corp., 91 IBLA 93, 96 (1986). In every instance we have recognized BLM's right to readjust is preserved if a lessee is notified of the intention to readjust prior to the deadline for readjustment. The Department has consistently taken the position that the readjustment process does not have to be finalized so long as a notice of intention to readjust was provided prior to the end of the then-current lease term. Id. The specific provisions of readjusted lease may be submitted at a later date, even following the expiration of the term.

The record shows that notice of intent to readjust Cheyenne 033800 was given lessee prior to the 20-year anniversary date of the lease. That notice conformed to Departmental regulations and satisfied the minimum requirements of the law. Thus, we conclude that BLM's readjustment of appellant's lease was timely under the statutes and regulations. See Gulf Oil Corp. v. Clark, 631 F. Supp. 29, 31 (D.N.M. 1985), aff'g Gulf Oil Corp., 73 IBLA 328 (1983).

[2] Appellant complains that adoption of certain terms without inquiry into the factual circumstances of the lease renders the readjustment arbitrary and capricious. This Board has held that a decision by BLM to readjust a

coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation or where such provisions are in accordance with the proper administration of the public lands. Coastal States Energy Co., 94 IBLA at 355; Gulf Oil Corp., 91 IBLA at 98-99. Where proposed terms of a readjusted lease have been mandated by statute or regulation, the Board has held BLM must include such terms in the lease. Gulf Oil Corp., 91 IBLA at 99; Consolidation Coal Co., 86 IBLA 60, 66 (1985). A lessee has no vested right to the indefinite continuation of existing lease terms, as the initial lease contains no limitation regarding contract terms subject to readjustment. To hold otherwise would negate the statutory right to readjust. Coastal States Energy Co., 94 IBLA at 355. Insofar as a coal lease readjustment is concerned, a lessee has only one existing right, the right to accept or reject the continuation of a coal lease beyond a 20-year period under such reasonable terms as the Secretary deems proper. Consolidation Coal Co., 86 IBLA at 64.

[3] We have stated that in order for the Department to reconsider its position on the readjusted provisions of a lease, an appellant must demonstrate that a protested term or condition is not in accordance with statute, regulation, or proper administration of the public lands. Gulf Oil Corp., 91 IBLA at 98-99. Here, many of the new terms and provisions of the lease imposed under the readjustment are required by FCLAA and the regulations promulgated pursuant to that statute. The argument that the provisions of FCLAA, enacted after issuance of the lease, may not be applied to such pre-FCLAA leases has been rejected by this Board on numerous occasions. See Coastal States Energy Co., 94 IBLA at 355. Although lease readjustment is discretionary, if the Secretary readjusts a lease, he is obligated by law to impose certain lease terms and conditions on all pre-FCLAA leases at the time of readjustment in order to conform to the provisions of FCLAA mandated by Congress. Gulf Oil Corp., 91 IBLA at 99; Gulf Oil Corp., 73 IBLA 328, 331-32 (1983).

Appellant's remaining arguments focus on individual lease terms and whether the readjustment proposed by BLM is factually supported and reasonable. Appellant charges that BLM improperly used "boilerplate language" in the readjusted lease. BLM's use of a standard form for coal lease readjustments is reasonable and justifiable. Coastal States Energy Co., 94 IBLA at 355. The proposed form provides space for the insertion of information which is specifically applicable to the lease in question.

Appellant asserts that BLM's determination of the "effective date" is arbitrary. It argues the date cannot be established until the review process is exhausted. The Board has reviewed and rejected this argument. See, e.g., Coastal States Energy Co., 94 IBLA at 356.

Appellant complains that readjusted terms reduce the lease contract to a "mere 'agreement to agree' or 'agreement to reagree'" because section 1 of the readjusted lease provides that the lease is subject to statutes and regulations "now or hereinafter in force." This Board has previously approved the adoption of similar provisions subjecting a lease to future regulations pertaining to coal leasing and held such provisions to be within the scope

of authority delegated to the Secretary. Gulf Oil Corp., 91 IBLA at 100; Consolidation Coal Co., 86 IBLA at 67. In those cases we found the lessees were adequately protected from unreasonable application of new or revised regulations. If a decision is rendered in the future adversely applying changed regulations to this lease, appellant may appeal for relief from that decision. Accordingly, the objection to section 1 was properly rejected.

Appellant argues that the readjusted lease wrongfully eliminates the right to manufacture coke or other coal products on the lease area or to use the lands for employee housing and welfare. Appellant seeks reinstatement of these rights. The Board has reviewed similar arguments with respect to this type of action and has affirmed BLM's decision on the basis of the fundamental authority to readjust the lease. E.g., Coastal States Energy Co., 94 IBLA at 356-57; Ark Land Co., 90 IBLA 43, 49 (1985).

Appellant also objects to the provisions found in section 3 of the readjusted lease for diligent development of the leased lands and for termination of the lease in the absence of commercial production. As they are mandated by FCLAA or its implementing regulations, these provisions are properly imposed by BLM. See 30 U.S.C. § 207 (1982); 43 CFR Subpart 3483.

Appellant objects to the original increased bond amount required in section 4 of the readjusted lease. Appellant contends there is no established standard for formulating the bond amount and BLM has shown no factual basis for the amount specified in the readjusted lease. No statute or Departmental regulation provides a specific formula for computing the amount of a bond required for Federal coal leases. Cf. 30 U.S.C. § 187 (1982); 43 CFR Subpart 3474. Nonetheless, the bond amount is required by 43 CFR 3474.2(a) to be adequate to assure "compliance with all terms and conditions of the lease" except reclamation. Appellant has provided no evidence that the amount stipulated by BLM was more than was required to accomplish the regulatory purposes set forth in 43 CFR 3400.0-5(s). Cf. Sunoco Energy Development, 84 IBLA 131, 135 (1984); Coastal States Energy, 81 IBLA 171, 175 (1984).

Similarly, appellant objects to the increase in rental which may not be credited against royalties. The current regulation, 43 CFR 3473.3-1(a), sets the new rental rate at not less than three dollars per acre. Furthermore, there is no longer authority to allow rental to be credited against royalty; FCLAA deleted the applicable authorization from the MLA. See 47 FR 33114, 33131 (July 30, 1982); 43 CFR 3473.3-1(c). The Board has considered and rejected appellant's objections to these provisions in Gulf Oil Corp., 91 IBLA at 100, and cases cited therein.

Appellant objects to the proposed increase in production royalty. Departmental regulation 43 CFR 3473.3-2(a)(2) provides that "[a] lease shall require payment of not less than 12-1/2 percent of the value of the coal removed from a surface mine." See 30 U.S.C. § 207(a) (1982). At 43 CFR 3473.3-2(a)(3) it is provided: "A lease shall require payment of a royalty of not less than 8 percent of the value of the coal removed from an underground mine, except that the Minerals Management Service may determine a lesser amount, but in no case less than 5 percent if conditions warrant."

And 43 CFR 3451.1(a)(2) provides that "[a]ny lease subject to readjustment which contains a royalty rate less than the minimum royalty prescribed in § 3473.32 of this title shall be readjusted to conform to the minimum prescribed in that section."

We note that the United States Court of Appeals for the Tenth Circuit has recently addressed this precise question. In FMC Wyoming Corp. v. Hodel, Nos. 84-2175 and 84-2208 (decided April 8, 1987) and Coastal States Energy Co. v. Hodel, No. 86-1301 (decided April 8, 1987), the court generally sustained the Department's readjustment of certain coal leases against challenges substantially similar to those pressed herein. Specifically, in FMC, the court expressly noted, with respect to the readjusted royalty rate for coal removed from a surface mine, that "as the Secretary was directed by law to raise the royalty rate to at least 12 1/2 percent of the value of the coal mined, an individualized evaluation could not have produced any result more favorable to FMC." FMC Wyoming Corp. v. Hodel, supra, (Memorandum Opinion at 12 n.12).

However, in one area, the court did not agree with past rulings of the Board. Thus, with respect to underground mines the Board had upheld a BLM interpretation of 43 CFR 3473.3-2(a)(3) as requiring that leases be readjusted to provide for an 8 percent royalty rate on all coal removal from an underground mine. See Coastal States Energy Co., 70 IBLA 386, 393 (1983). The regulation provides:

> A lease shall require payment of a royalty of not less than 8 percent of the value of the coal removed from an underground mine, except that the authorized officer may determine a lesser amount, but in no case less than 5 percent if conditions warrant.

In reversing this holding, the court noted that is was an error to fix the readjusted royalty rate at 8 percent for all underground coal, since such an approach "completely ignores the ensuing provision in the same regulation that a lesser amount, but not less than 5%, may be set 'if conditions warrant.'" Coastal States Energy Co. v. Hodel, supra (Memorandum Opinion at 12). In so holding, the court noted that its interpretation of the regulation was in accord with the interpretation espoused by this Board in a more recent case, Utah Power & Light, 80 IBLA 180 (1984).

The immediate question before the Board in this case is whether or not a royalty rate of less than 8 percent could be justified on the ground that the conditions warrant a royalty rate of less than 8 percent. We think not.

It is important to note that both Coastal States and Utah Power & Light involved on-going underground mine operations. While the instant lease is also in production, the coal is being mined by surface methods. As we noted above, the court held in FMC Wyoming Corp. v. Hodel, supra, that the application of the 12-1/2 percent royalty rate to surface production was statutorily required and not dependent upon an individualized evaluation of the lease.

Thus, insofar as present activities are concerned, the 8 percent royalty rate for coal removed from an underground mine has no impact. There is no indication in the present case that any underground operations are occurring on the lease premises or that any resource recovery and protection plan (see 43 CFR 3482.1(b)) has been tendered which embraces such operations. In the absence of either on-going operations or pending specific proposals to commence underground mining, we do not believe that a lessee can establish that "conditions warrant" a royalty rate of less than 8 percent for coal removed by underground operations and, therefore, no reduction of this rate could be authorized under the present regulation. 1/ Accordingly, we affirm the imposition of the 12-1/2 percent royalty rate for coal removed by surface operations and the 8 percent royalty rate for coal removed by underground operations as part of the readjusted lease terms.

Appellant objects to the change from quarterly to monthly payments of royalty. This objection has been previously reviewed by the Board and rejected in Coastal States Energy Co., 94 IBLA at 360. The changes BLM may impose through coal lease readjustment are not limited so long as they are in accordance with the proper administration of the land. Readjustment of the timing of royalty payments is within the scope of BLM's broad authority to readjust the terms of the coal lease. Id.

Appellant also objects to sections 7 (advance royalty), 9 (explora-tion plan), 10 (mining plan), 11 (logical mining units), 14 (authorization of other uses and disposition of leased lands), 17 (employment practices), 18 (monopoly and fair practices), 23 (readjustment of terms and conditions), and 27 (inspections and investigations). Appellant asserts that these provisions violate their contract rights and are arbitrary and capricious. As we have previously noted, a lessee has no vested rights to the indefinite continuation of existing lease terms. Coastal States Energy Co., 94 IBLA at 355. We reaffirm our rejection of these same objections in Coastal States Energy Co., 94 IBLA at 360-62, and Ark Land Co., 90 IBLA at 52. In those decisions, we stated that appellant had no such contractual rights, nor were the provisions arbitrary and capricious.

[4] Appellant's final objection in IBLA 86-255 involves the language in section 30 of the readjusted lease concerning cultural and paleontological resources. Appellant argues that these stipulations ignore the fact that surface disturbance activities have already taken place on the lease and suggests that the mere acceptance of these stipulations may result in their violation. It appears that the lessee might be in violation of the stipulations as proposed if surface disturbance has occurred. Thus, we conclude that these stipulations must be amended in order to clarify the extent to which appellant's existing operations are affected and to ensure that mere acceptance of the lease does not constitute a violation thereof. Kerr McGee

1/ If underground operations should commence sometime after coal lease readjustment, the lessee could avail itself of the relief afforded by 43 CFR 3473.3-2(d) and file for a reduction of royalties. Upon the next readjustment of the lease, the lessee could seek to show that a more permanent reduction of the lease term was warranted under 43 CFR 3473.3-2(a)(3).

Coal Corp., 96 IBLA 280 (1987), Coastal States Energy Co., 94 IBLA at 362; Coastal States Energy Co., 81 IBLA at 178.

To the extent that appellant has raised other arguments with respect to the November 26, 1985, decision which we have not specifically addressed herein, they have been considered and rejected.

[5] We turn now to the second decision under appeal, dated May 27, 1986, in which BLM directed appellant to increase its lease bond for lease Cheyenne 033800 from $ 22,000 to $ 454,000. Actually, we would point out that the November 26, 1985, decision raised the bond from $ 22,000 to $ 195,000. The May 27, 1986, decision increased this figure to $ 454,000.

The basis of this appeal was originally that, since the 1985 decision increasing the royalty rates (upon which the increase in bonding was based) was still under appeal, it was improper to premise a further increase on the bonding level upon the challenged royalty increase.

In our Order of January 28, 1987, we declined to put the increase in bonding mandated by the May 27, 1986, decision into effect during the pendency of the appeal. Our decision was premised on an analysis of the interrelation of 43 CFR 4.21(a) and 43 CFR 3451.2(e). In essence, we concluded that inasmuch as 43 CFR 3451.2(e) expressly provided that the obligation to pay 2/ royalties and rentals under readjusted lease terms was suspended during the pendency of the appeal, it would be inconsistent with the thrust of that regulation, absent an express regulatory provision so providing, to permit BLM to increase bonding levels based on the royalty rates, while the rates were, themselves, still under appeal. We noted, however, that "should this Board affirm BLM's readjustment decision as it relates to the increase in royalty rates, * * * there would be no bar to the implementation of the decision requiring increased bonding." Since we have herein affirmed the decision readjusting royalties rates, 43 CFR 3451.2(e) is no longer a bar to implementation of the May 27 decision.

We also noted in our Order, with reference to another lease involved therein, that decisions issued by this Board are final for the Department upon their issuance. Further, we noted that the mere filing of a suit for judicial review does not deprive the Department of the authority to enforce its decisions during such review. See Winkler v. Andrus, 614 F.2d 707, 709 (10th Cir. 1980); Holland Livestock Ranch, 52 IBLA 326, 357-58, 88 I.D. 275, 292 (1981); Andrew L. Freese, 50 IBLA 26, 35, 87 I.D. 395, 399 (1980); see also, 5 U.S.C. § 705 (1982). Thus, the fact that appellant is likely to seek judicial review of the decision readjusting the royalty rates is no bar to either increased bond requirements or collection of the increased royalty. 3/

2/ The regulation does provide that royalties and rentals continue to accrue under the readjusted terms during the pendency of the appeal and that such must be paid, with interest "if the decision is upheld on appeal." Id.

3/ This, of course, assumes that a Federal court has not taken affirmative action to suspend the implementation of the Department's decision during its review thereof.

Therefore, in the absence of any challenge to the method of computing the increase bonding requirements, we hereby affirm the May 27, 1986, decision directing appellant to submit increased bonding in the amount of $ 454,000 for lease Cheyenne 033800.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the November 26, 1985, decision of the Wyoming State Office is affirmed as modified and remanded for further action consistent herewith and the May 27, 1986, decision is affirmed.

James L. Burski
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Will A. Irwin
Administrative Judge